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## MASSIMO PAVARINI AND ITALIAN EXCEPTIONALISM

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### 1. Introduction

Massimo Pavarini was for many years the leading Italian scholar of penal law and policy. His passing is a great loss. His ideas and influence, however, will long endure. My aim is to draw on his writings on the evolution of penal policies and practices in Italy in recent years and place them in the context of the international literature that has emerged since 1995. A quick look at two of Pavarini's writings, a 1994 article in the "British Journal of Criminology", *The New Penology and Politics in Crisis – The Italian Case*, and his 2013 book, *Governare la penaltà. Struttura sociale, processi decisionali e discorsi pubblici sulla pena*, provides context.

In the 1994 article, written at a time when there was no meaningful comparative or cross-national literature, he drew on Italian writing, on the work of British critical criminologists such as Jock Young, Stanley Cohen, and Roger Matthews, and on early work by the Scottish sociologist David Garland. The views he expressed were ahead of the times and anticipated the bottom line of the international literature that emerged in the ensuing years: national penal policies and practices emerge from conditions created by distinctive histories, institutions, and cultures. General theories can illuminate and provide context for national experiences, but have little independent explanatory value.

Italian imprisonment rates for adults declined in the 1970s and were broadly stable in the 1980s and early 1990s: levels of youth confinement were exceptionally low by international standards, and still are. Criminal laws became more severe in the 1980s and criminalization expanded, but punishment patterns did not reflect the changes. Here is how Massimo explained that disjunction:

Penal immunity and liability is therefore one aspect of the 'political distribution' of social wealth in the broad sense, the contingent outcome of social conflict, which will thus allocate penalty in society in relation to such outcomes. *Just as this process explains why the sphere of criminal offence has widened, it also accounts for the relative lack of influence this expansion has had* (...). The effective levels of repression have proved to bear little relation to the unequal allocation of an artificial punishment in

society. Rather, they depend on social demands for repression, that is, social demands for greater or lesser punishment. Here lies the peculiarity of the Italian situation; in actual fact the demand for punishment at the social level has long been weak. *Social conflict and crisis – key features of recent Italian history – have not been turned into equally strong social demands for punishment. (...) Antibodies of resistance to the system of penal repression have long been present in Italy.* A diffident culture, prone to suspicion, has been more concerned about the perils of repressive agencies than the perils of criminality (M. Pavarini, 1994, 51, 53; *emph. added*).

There are in Italy, he similarly wrote in 2001, «*bodies of resistance against the system of penal repression [that are] far more resistant to repressive agencies than to the dangers of crime (...). These complex reasons reflect a political and cultural situation peculiar to Italian history*» (M. Pavarini, 2001, 415).

Massimo's 2013 book provides a wealth of statistical, theoretical, and historical material on developments since 1970 with particular emphasis on the past 25 years. As in 1994 and 2001, he refused to substitute theoretical simplicities for complex realities. He took account of major developments in the international literature and speculated on how they might apply to Italy. He provided a base on which coming generations of scholars will build. His substantive conclusions changed little. Of the relation of crime rates to penal severity: «*I tassi di repressione (...) mostrano di essere sufficientemente irrelati dagli andamenti della delittuosità*» (M. Pavarini, 2013, 52).

On why countries have starkly different punishment practices: «*La pratica del carcere come risposta alla questione criminale sia la risultante di una pluralità molto ampia di fattori (...). Una diversità che rinvia alla storia (culturale, politica, economica, sociale, etc.) dei singoli paesi e che non sempre può essere esaurientemente spiegata mettendo a confronto solo alcune variabili*» (*ivi*, 24-5).

The basic theme of Massimo's 1994 article – Italian punishment practices can be understood only in the light of national culture and history – anticipated what is now the common understanding (e.g., M. Tonry, 2001, 2009; D. Garland, 2013, 2014; S. Snacken, 2015). However, he could have focused on a distinctly, though not uniquely phenomenon. It was something he knew well but under-emphasized, maybe precisely because he was Italian and did not see it as being as distinctive as an outsider might. The mechanism that underlay declining and stable imprisonment rates in the 1970s through early 1990s was neither a reluctance by prosecutors and judges to punish offenders, nor public resistance to harsh punishments. The mechanism was the frequent implementation of broad and narrow amnesties and pardons<sup>1</sup>

<sup>1</sup> To save words, from this point I use the term amnesties to refer to the technically different

(P. Gonnella, 2013). Had they not occurred, Italian imprisonment rates in the early 1990s would probably have been much higher than they were, and possibly at the time the highest in Western Europe.

The key question in 1994 thus might have been not “Why are imprisonment rates not higher?” but “Why does Italian culture tolerate recurrent amnesties and pardons?”. They would not then have been politically possible in many other countries, and would not be now. In Scandinavia, the objection would be that large-scale amnesties deny the equality principle that underlies the *Rechtsstaat*. To punish some offenders less severely than they deserve, and less severely than others convicted of the same offenses earlier or later were or would be punished, because the prisons are crowded, is unjust to those other offenders. In some English-speaking countries, in which penal policy has often in recent decades been a partisan political or ideological subject, politicians who supported a mass amnesty would be disparaged as soft on crime, disrespectful of victims, and indifferent to crime prevention objectives.

A similar question could be asked about France, another European country in which, until Nicolas Sarkozy was elected president, large-scale collective pardons and amnesties were common, and substantially reduced national imprisonment rates (e.g., R. Levy, 2007). Dario Melossi (2001) suggested that the influence of Catholic ideas about sin and forgiveness is among the reasons why Italians accepted collective amnesties. That may also be true of France.

In this paper, I discuss some of the issues Massimo raised in light of the subsequent development of a cross-national literature on the determinants of national penal policies and practices. In the first section I briefly explain why that literature emerged when it did, and not before. In the second, I survey the literature that, after many false starts, in recent years has reached general agreement with the national culture perspective from which Massimo began. In the third, I return to Massimo’s 2013 book, especially chapter 3 in which he offers explanations for contemporary Italian policies and practices.

## 2. The Emergence of a Comparative Literature

The catalysts of the comparative literature were the combination of America’s three-fold increase in imprisonment rates between 1973 and the early 1990s, tripling from an already high 160 inmates per 100,000 population, and apprehension that something similar would happen in Europe. It was then a

legal institutions of amnesties, commutations, and pardons. Massimo, of course, understood the decisive role of commutations and in his 2013 book in graph 3.5 shows their frequency and dramatic effect during the period 1949-2013.

common cliché that America's present often foretells Europe's future. Europe was awash in American influences in the arts and sciences, popular culture, and even politics. Conservative Ronald Reagan became US president in 1980. He was followed by the ascensions to power of other conservatives including Margaret Thatcher in the United Kingdom, Helmut Kohl in West Germany, Jacques Chirac in France, Jose Maria Aznar in Spain, Kurt Waldheim in Austria, and Silvio Berlusconi in Italy. It was reasonable to wonder, and worry, whether the punitive penal policies and practices of a more conservative, moralistic, and judgmental America might soon begin to appear in Europe. European officials, scholars, and expert groups in the early 1990s convened conferences to ponder and attempt to influence the future of European punishment policies and practices. At the time, despite two decades of rising crime rates in all Western countries, European imprisonment rates were broadly stable. Only in the Netherlands were rates rising as quickly as in the United States, but from such a low starting point that almost no one noticed.

The earliest efforts to explain what had happened in the United States focused on rising crime rates, which of course increased the numbers of prosecutions and convictions, on public anxieties and anger, and on politicians' responses (W. Bennett, J. DiIulio, J. Walters, 1996). It was commonly said that pressure for greater severity came from below: politicians and practitioners became more punitive in response to rising crime rates and punitive public attitudes. The English scholar Anthony Bottoms (1995) wrote the first major work on determinants of national penal policies and attributed rising imprisonment in England to what he called "populist punitivism". The public demanded and the state responded.

Influential 1996 and 2000 articles by the Scottish sociologist David Garland in the "British Journal of Criminology", prequels to *The Culture of Control*, also attributed law and order politics and harsher policies to pressures from below. The 2000 article set itself this challenge: «If masses of people are now invested in crime narratives and supportive of punitive policies, casting their votes and spending their taxes in support of these policies, then this is a phenomenon that requires explanation» (D. Garland, 2000, 353). That was the scholarly backdrop to Massimo's 1994 article.

### **3. Determinants of Penal Policy: The Literature**

Bottoms's and Garland's work each catalyzed specialized literatures that offered general theories based on the premise that changes were occurring in response to popular demands. The first explored the influence of "penal populism" and the second emphasized rising crime rates, state responses to popular fears and anxieties, rapid social and economic change, and post-

modernist angst that together produced exclusionary “cultures of control”. Both efforts in due course proved inadequate. David Garland (2013, 2014) eventually strongly qualified his own earlier ideas.

#### ***A) Populist Punitiveness and Penal Populism***

Two years before Anthony Bottoms wrote about populist punitiveness, English media and politics were preoccupied with the kidnapping and brutal killing by two 10-year-old boys of two-year-old William Bulger. Not-yet-prime-minister Tony Blair described the killing as evidence of a moral breakdown in English society. Almost instantly, punishment practices in England became more severe. Judges sent more convicted offenders to prison, and for longer periods. English imprisonment rates had been stable or declining for a decade under the Conservative governments of Margaret Thatcher and John Major, but shot up by 50 percent to historically high levels from which they have yet to decline (D. Green, 2008).

Bottoms’ ideas laid a foundation for two versions of penal populism. The first, primarily influential in Britain and the Commonwealth and most prominently associated with the New Zealander John Pratt (2007), was active: the pressures created by public opinion were powerful and politicians felt obliged to respond. In the second version, exemplified by Jonathan Simon’s *Governing through Crime* (2007), public anger and anxiety were real but latent and manipulable. Opportunistic American politicians deliberately provoked public outrage about crime and criminals to win elections in order to pursue other policy objectives. They adopted repressive crime policies to show they were responding to the public outrage they had earlier precipitated (K. Beckett, 1997). This echoed Garland’s (2000, 2001) argument that policy makers understood that the state’s capacity to affect crime rates and patterns was limited but nonetheless adopted severe policies, whether or not they could reasonably be expected to work, in order to reassure an anxious public and attempt to buttress their own legitimacy.

These bottom-up theories have largely lost credibility because it is far from clear that they accurately depict what happened in the United States, England, and possibly New Zealand, and they are not generalizable to other countries. Simon’s ideas were embedded in distinctive American historical developments and governmental arrangements, which makes it odd that European critical criminologists often cited his book as relevant elsewhere. Massimo rejected general theories even before they were formulated and focused instead on things uniquely Italian.

#### ***B) Cultures of Control***

David Garland’s *The Culture of Control* (2001) was eloquent, intelligent,

and wrong. Governments, he argued, felt obliged to act to maintain their own legitimacy but as a practical matter they could do little to ameliorate the “conditions of late modernity” and even less about crime. They therefore adopted repressive but “expressive” crime policies that were unlikely to make much difference. So as not to weaken support among majority populations, a “criminology of the other” required that repressive policies target crimes by members of minority and immigrant groups.

Garland’s arguments were hugely influential but like the penal populism theories they were not generalizable, it at all, beyond a few English-speaking countries. In *The Culture of Control*, Garland primarily discussed the United States and England, but some passages suggested that the analysis should apply to other developed Western countries. For example, he observed that «*late modernity (...) emerged in America, Britain, and elsewhere in the developed world in the third of the twentieth century and [brought] with it a cluster of risks, insecurities, and control problems that have played a crucial role in shaping our changing response to crime*» (ivi, VIII).

In an earlier article about changing crime policies and politics, he was more explicit, observing that «*there is evidence to suggest that similar trends are also present in the USA, Australia, and elsewhere*» (D. Garland, 1996, 444). Hans-Jörg Albrecht (2001) famously challenged the “and elsewhere” by pointing out that most European countries had not adopted conspicuously severer penal policies in the 1990s and that imprisonment rates in most had not substantially increased even during the 1980s and early 1990s when crime rates everywhere rose substantially (M. Tonry, 2014). During the 1990s, imprisonment rates had been broadly stable in most Western countries including Canada, Australia, France, Germany, Belgium, and Switzerland, and in the Nordic countries.

### ***C) Political Economy and Neo-Liberalism***

The next wave of writings adopted frameworks from comparative political science. An influential 2005 book by the Englishmen Michael Cavadino and James Dignan (2005) related penal policies and practices to a political economy typology. Social democratic corporatist economies like those in Scandinavia, they said, produce the most humane penal policies and lowest imprisonment rates, neoliberal countries like the United States and Great Britain generate the cruelest policies and highest levels of imprisonment, and conservative corporatist states like France and Germany fall in between.

Cavadino and Dignan’s book captured the imaginations of many academics but also proved non-generalizable. Their typology simply did not fit the diversity of Western penal policies. Canada, for example, is Anglo-Saxon and neoliberal but has had mild penal policies and stable imprisonment rates

around 100 per 100,000 population since 1950 (A. Doob, C. M. Webster, 2016). The Netherlands is a card-carrying social democratic corporatist state but its imprisonment rate increased steadily – by more than 6 times – from 1973 to 2005 (M. Tonry, C. Bijleveld, 2007). That was a larger percentage increase than occurred in the United States during the same period. Spain, Portugal, and Italy were core social democratic states but at different times in the past 15 years have had among the highest imprisonment rates in Western Europe.

Nicola Lacey (2008, 57) offered a somewhat similar but more sophisticated analysis, drawing more fully on the comparative political science literature. In the end, however, she finds explanations in the distinctive characteristics of individual countries: *«My analysis (...) argues that political-economic forces at the macro-level are mediated not only by cultural filters, but also by economic, political, and social institutions. It is this institutional stabilization of and mediation of cultural and structural forces, and the impact which this has on the perceived interests of relevant groups of social actors, which produce the significant and persistent variation across systems at similar stages of capitalist development».*

The neoliberalism and political economy theories, like penal populism and *The Culture of Control*, reached dead ends as general explanations. A second set of theories, much closer to Massimo's ideas, looks at characteristics of individual countries. It has proven far more useful.

#### ***D) Political Systems' Structural Characteristics***

Since the general theories that seemed to transcend national boundaries could neither explain nor predict differences in national policies, the logical next step was to look at countries' structural characteristics. Early efforts invoked the Dutch political scientist Lijphart's (1984, 1999) comparative work on national policies associated with different kinds of political systems. He showed that countries with "consensus" political systems characterized by multi-party governments, proportional representation, and broadly inclusive policy-making processes tended to have liberal and stable public policies on a wide range of subjects. By contrast, "conflict" political systems characterized by two dominant parties, single-member electoral districts, and stark policy conflicts tended to have less stable and less liberal policies. Lijphart wrote little about penal policy, except concerning capital punishment, but his generalizations fit there too. Countries with two-party conflict political systems like the United States, England, New Zealand, and most Eastern European countries tend to have harsher policies than do consensus political systems characterized by proportional representation and coalition governments like most countries in Western Europe.

Once the focus shifted from broad theory to national characteristics, a number of explanatory patterns emerged. One major predictor of harsh penal policies and high imprisonment rates is whether judges and prosecutors are nonpartisan, career civil servants or are elected or selected according to political criteria. Another concerns the comparative influence on policy making of expert contrasted with public and media opinion. A third contrasts Francophonic (or more probably Catholic) countries and regions with Anglophonic countries. A fourth focuses on the nature of the mass media, contrasting the influence of sensationalistic media like the English tabloids with that of the soberer mass media of northern Europe (M. Tonry, 2004, 2007).

This approach began to produce generalizable insights that helped explain and predict national policies. They also moved analysis to a more basic level that sought to explain why countries have particular characteristics. Why does expert opinion, for example, count more in some places than in others, and why do some countries have professional rather than politically selected and motivated judges and prosecutors?

### ***E) Political Cultures***

The Finnish criminal lawyer and criminologist Tapio Lappi-Seppälä (2008) began to provide the answers about 10 years ago in large-scale quantitative analyses of multi-national, often global surveys prominently including the World Values Survey. To summarize a rich literature briefly: harsh policies and high imprisonment rates are associated with high levels of income inequality, low levels of social welfare expenditure, low levels of citizens' trust in one another, and low levels of state legitimacy in citizens' minds. Less harsh policies and low imprisonment rates are associated with the polar opposites: low income inequality, high social welfare expenditure, high levels of trust among citizens, and high levels of perceived state legitimacy.

### ***F) National Histories and Cultures***

The factors identified in the fourth and fifth generations of efforts to understand differences in national penal policies also need explanation. Why do countries have high or low social welfare expenditures, high or low income inequality, professional or political cadres, or look to expert or public opinion for policy guidance? The answers to those questions are to be found in distinctive national histories and cultures. For the United States, the answers include the history of race relations, the moralizing influence of Evangelical Protestantism, obsolete constitutional arrangements that provide for political selection of judges and prosecutors, and engrained distrust of government. For England, they include the history of class relations, strong commitment

to ideas about hierarchy and authority, the doctrine of Parliamentary Supremacy, lack of a written constitution, and weak support for human and procedural rights. In Germany, the *Rechtsstaat* ideal, the reaction to radical authoritarianism, and historical leadership in social welfare are important. Each country has its own tale to tell. So, Massimo told us in 1994, 2001, and 2013, does Italy.

#### 4. Italian Exceptionalism

Italians have not in general been active participants in the development of the international literature. Massimo said as much in 2013: «*In Italia, forse con la sola esclusione di alcune ricerche di [Dario] Melossi e del sottoscritto (oramai datate), a tutt'oggi non si è progrediti un granché*» (M. Pavarini, 2013, 53).

Massimo showed the way forward in his 2013 book. Although he was aware of and discussed most of the literatures I have described, he insisted as in 1994 that the story of Italian penal policy must be a story about Italy and not simply an application to Italy of ideas and theories offered to explain developments elsewhere.

I was able to locate only a comparatively small number of books and articles in English about recent Italian penal policies and practices. Unfortunately, with the exception of writings by Massimo, Dario Melossi (2001), and David Nelken (2005), most do not add much to understanding either of national differences or of changes in policies and practices. Some, written in Italian, are intelligent and thoughtful but basically rehearse general ideas associated with penal populism, the culture of control, and political economy (e.g., L. Re, 2006; S. Anastasia, 2012).

Alessandro De Giorgi (2006, 100-1) finds general explanations of penal policy developments in developed countries in the literature on “Post-Fordism”. His major work, mostly discussing the United States but offering broader generalizations, centers on

the relationship between penal and social policies in the management of poverty and the control of the labour force. The new ‘problem population’ – the ‘surplus’ labour force produced by the post-Fordist economy – is managed less through the instruments for the ‘social’ regulation of poverty, and more through penal technologies (...). These are the coordinates of the new Euro-American penal strategy characterizing the transition from Fordism to post-Fordism and from the welfare state to the penal state.

In a more recent article, he asserted: «*the symbolic and discursive dimensions of penal politics appear mostly as ideological ‘outgrowths’ of a penal state whose*

*main role is to punitively regulate the poor in order to force them into the post-Fordist labor market»* (A. De Giorgi, 2013, 50). Inasmuch as the effects of deindustrialization and globalization are felt in every developed country, this argument, whatever other claims might be made for it, cannot explain why penal policies and practices differ enormously between countries or why they change over time.

Fortunately, though, talented young members of the Italian intellectual diaspora are telling the story with intelligence and imagination. Two, in different ways inspired by Massimo, will no doubt extend the themes of his work. Zelia Anna Gallo, at the London School of Economics, in *Penality in Contemporary Italy 1970-2000* (2013) and related articles (e.g., Z. Gallo, 2014, 2015), examines distinctive Italian developments in comparative perspective and emphasizes the legitimacy of the judiciary as an important moderator of the effects of repressive policies. Alessandro Corda (2016), at the University of Minnesota, recently completed a comprehensive and insightful historical account entitled *Sentencing and Penal Policies in Italy, 1985-2015: The Tale of a Troubled Country*. His work combines careful empirical, policy, and legal analyses with the “law in action” perspective of Legal Realism.

Massimo Pavarini (2001, 414) long ago observed: *«The choice of a particularly severe criminal policy at the level of primary criminalization processes has always been contradicted by administrative and judicial practices, that is, secondary forms of criminalization, which are particularly benevolent if not openly indulgent»*. Corda (2016) identifies and explains the workings of the institutions and actors that actuate, in Massimo’s terms, the “antibodies of resistance to the system of penal repression” that have long protected Italy from mass incarceration and stalemated politicians’ efforts to politicize penal policy.

Massimo observed in 2013 that *«punire di più o punire di meno, dipende anche se non soprattutto dalla catena decisionale in cui si struttura il processo di criminalizzazione secondario»* (M. Pavarini, 2013, 56). Italian political and popular cultures have long accepted approaches to crime that are not fundamentally repressive. The history of mass commutations, twice in the past decade, demonstrates this. Massimo (*ivi*, 59) explained why it is so: *«I livelli effettivi di repressione ben poco hanno mostrato quindi di dipendere dall’allocazione diseguale di una penalità artificiale nel sociale quanto piuttosto dalla domanda sociale di repressione, cioè dalla domanda sociale di maggiore o minore penalità. E in ciò forse risiede la peculiarità della situazione italiana: la domanda di penalità è di fatto, e per lungo tempo risultata debole a livello sociale»*.

In retrospect, it is surprising that the now refuted general theories that sought to explain penal policy developments received as much attention as they

did. The developments they centered on – rising crime rates in the 1970s and 1980s, globalization and the spread of neoliberalism, economic restructuring, increasing population diversity and movement, the existential challenges of “late modernity” – affected every developed country. Yet penal policies and practices unfolded in starkly different ways in different countries from 1970 to the present. The meaningful stories of penal policies and practices, and changes in them, are necessarily national, not general or global.

I am but a kibitzer concerning subjects Italian, but look forward to the time when Italian scholars occupy the first rank among penal policy specialists worldwide. The Italian story is as exceptional as the American or the Scandinavian or the Dutch. In due course, promising younger Italian scholars will no doubt follow the paths that Massimo Pavarini charted. Italian exceptionalism will then be as well-known and well-understood as the exceptionalisms of other Western countries.

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